Filed 12/31/09 P. v. Espinoza CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CANDIDO ESPINOZA,

Defendant and Appellant.

F056830

(Super. Ct. Nos. VCF197090 & VCF197582)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Judge.

Jagdish J. Bijlani, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Kathleen A. McKenna, and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Vartabedian, Acting P.J., Levy, J., and Cornell, J.

STATEMENT OF THE CASE

On January 16, 2008, appellant, Candido Espinoza, was charged in a criminal complaint in case No. 197090 with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)). On April 3, 2008, an information was filed in case No. 197582 charging appellant with infliction of corporal injury to a spouse, cohabitant, or his child's mother (Pen. Code, § 273.5, subd. (a), count one),[1] three counts of assault with a deadly weapon (§ 245, subd. (a)(1)), counts two, three & five), making a criminal threat (§ 422, count four), being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a), count six), and possession of narcotics paraphernalia (Health & Saf. Code, § 11364, subd. (a), count seven). Count one alleged an enhancement that appellant had been convicted of domestic violence in the past seven years (§ 273.5, subd. (e)). Count one also alleged an enhancement that appellant personally inflicted great bodily injury (§ 12022.7, subd. (e)) and count two also had a great bodily injury allegation (§ 12022.7, subd. (a)). Counts one and four alleged appellant personally used a weapon (§ 12022, subd. (b)(1)). Counts one through five alleged an on-bail enhancement (§ 12022.1).

A jury trial commenced in case No. 197582 on August 12, 2008. The jury found appellant guilty on counts one, two, six, and seven. It found true the allegations that appellant personally used a deadly weapon and inflicted great bodily injury. The jury acquitted appellant of counts three, four, and five. Appellant waived his rights to a jury trial and admitted a prior conviction for domestic violence in 2007 and a conviction for battery of a spouse or cohabitant. The court granted the prosecutor's motion to dismiss

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

the on-bail enhancements. Appellant waived his rights and pled no contest to both counts in case No. 197090.[2]

On December 22, 2008, the trial court sentenced appellant in case No. 197582 to the midterm of three years on count one plus four years for the great bodily injury enhancement and one year for the use of a deadly weapon. The court stayed appellant's sentence on count two. In case No. 197090, the court sentenced appellant to a consecutive term of eight months for possession of methamphetamine. Appellant's total prison term is eight years eight months.

Appellant contends that his trial attorney was ineffective because during closing argument, counsel shifted the burden of proof from the People to appellant.

FACTS

Incident

Appellant and confidential witness, A.M., had a child together and were in an abusive relationship. On January 27, 2008, A.M. and appellant spent the day together. She had just had their child, they lost their vehicle that day, and they were going through hardship. The two were not agreeing about a lot of things. A.M. no longer wanted a relationship and tried to leave appellant more than once that day. Every time A.M. verbally told appellant she wanted to leave, it led to some physical abuse.

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[2] The parties stipulated to a factual basis to the plea based on the preliminary hearing transcript. Appellant's preliminary hearing in case No. 197090 was on March 26, 2008. The parties stipulated that the amount of methamphetamine found was .22 grams and 571 nanograms. The parties stipulated there were 33 nanograms of amphetamines found as well. On December 14, 2007, Officer Michael Benas of the Porterville Police Department contacted appellant, who was sweeping the rear floorboard of his car with the door standing open. Benas asked appellant to exit the car. Appellant told Benas he "still had a little ice in his pocket." On Benas's direction, appellant removed a plastic bag from his pocket. The bag contained an off-white crystalline substance. Appellant told Benas where he could find a glass pipe in the car. Benas removed the pipe. The word "ice" is a slang expression for methamphetamine. After conducting a field sobriety test, Benas concluded appellant was under the influence of a controlled substance.

A.M. and appellant stopped first at her sister's house, then went to a friend's house, and eventually left. When A.M. insisted that their child stay with her, things began to escalate. A.M. told appellant she was tired of appellant thinking for her, talking for her, and controlling her and she was ready to walk away.

It was the early morning and A.M. was walking a few steps ahead of appellant. A.M. was walking faster to get home. As they were entering A.M.'s neighborhood, she was running toward her home. Appellant ran toward A.M. and kicked her in the back of her right leg. Appellant pulled out a knife and told A.M. he was going to "stick" her with it. At that moment, a police officer was coming from the opposite direction.

Appellant threatened A.M. that if she said or did anything to get the officer's attention, he would stick her with the knife. Appellant was pointing the knife at A.M. As A.M. tried to walk fast to get away, appellant threw the knife at A.M. and hit her. The force of appellant's throw was very hard. The knife hit A.M. in the lower back just above her waist and then fell to the ground. A.M. continued to walk away faster from appellant. Appellant told her to slow down because he was going to throw the knife at her again regardless of where it would hit her.

When appellant threw the knife a second time, it hit A.M. behind her right knee. As the knife slid out, A.M. began spurting blood like a water fountain. The knife was a folding knife about eight inches long. The tip had thin teeth and appellant was always sharpening it. A.M. realized appellant must have struck an artery. She could not stop the bleeding, felt nauseous, wanted to throw up, and was feeling faint. A.M. lost so much blood she thought she was going to die.

A.M. saw a couple on a walk and asked them for help. A.M. blacked out for a few minutes. When she woke up, there was a girl standing over her calling 9-1-1. When investigators arrived, A.M. had lost so much blood she could not talk. It took some time at the hospital for doctors to control the bleeding and to stabilize A.M. with blood transfusions. One doctor thought it was possible they would have to amputate A.M.'s leg. A.M. was transported to another hospital

A team of vascular surgeons at the second hospital repaired A.M.'s artery. A.M. required a skin graft to repair her artery. The vascular surgeons told A.M. they accomplished the impossible because they too thought they would have to amputate A.M.'s leg. On cross examination, A.M. admitted she and appellant had smoked methamphetamine the evening of the incident.

Officers John Hall and Lance Kirk were dispatched to the scene of A.M.'s stabbing at 1:23 a.m. on January 27, 2008.[3] Hall explained that when he arrived, he saw A.M. on the corner of the intersection on the sidewalk with an obvious injury to her right upper leg. The leg was bleeding significantly.

Hall spoke to appellant, who identified himself as A.M.'s boyfriend. Appellant explained that they were walking, talking, and laughing. According to appellant, everything was fine until suddenly A.M.'s eyes rolled back and she started to pass out. Appellant grabbed A.M. and laid her down on the ground. Blood was spurting from one of A.M.'s legs. Appellant looked up and saw two people wearing dark, hooded sweatshirts about 50 to 60 yards away. Appellant did not see anyone nearby before A.M. fell over bleeding.

Hall checked the area where appellant said he saw the people in sweatshirts. It had been raining that day. Investigators were leaving footprints in the soil, but their shoe tracks were the only ones in the area.

When Hall advised appellant that other witnesses observed an argument between appellant and A.M., appellant explained they were having a discussion and denied anyone was yelling. Appellant said A.M. did not raise her voice but then said that she got emotional.

Detective Mark Lightfoot was on-call that evening and went to investigate the attack on A.M. Lightfoot went to talk to A.M. at the hospital. The emergency room doctor told Lightfoot that A.M.'s injury was very serious and she could have bled to

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[3] Kirk testified that appellant failed field sobriety tests.

death. Although at first A.M. was uncooperative, after talking with her sister, A.M. explained that she had argued with appellant over problems in their relationship. As A.M. tried to walk away, appellant told her to stop and come back. When A.M. refused to listen to appellant, she felt something stab her leg. Photographs depicting bruises to A.M.'s neck and chest were admitted into evidence.

Detective Jeff Dowling was briefed by Hall about what had transpired and that appellant may have been lying about what happened. Dowling questioned appellant about what happened after reading appellant his *Miranda* rights.[4] Appellant told Dowling he and A.M. were arguing over their relationship. Appellant did not have a place to stay but did not get along with A.M.'s mother and sister, which was where A.M. wanted to stay. Appellant wanted to break into an abandoned house. A.M. refused to stay there so they began to argue.

Appellant told Dowling A.M. was behind him about three feet when she told him she felt something warm on her leg. Appellant turned around and saw A.M. bleeding. He helped her down. Appellant saw two figures running 60 yards away. Appellant explained that he saw a couple in a car, ran to them, and had them call 9-1-1. Dowling told appellant there were witnesses who saw him the entire time and they did not see anyone run up to A.M. Dowling also told appellant his story did not make sense. Appellant continued to tell the same story and denied stabbing A.M.

Robert Rodriguez, an employee at Taco Bell, was in his car in front of his girlfriend's home about 1:00 a.m. after going to the movies and dinner. Rodriguez was talking to his girlfriend. Rodriguez saw appellant walking back and forth with A.M. for 15 or 20 minutes. Appellant came up to Rodriguez and asked Rodriguez in an angry tone whether he had something to say. It was not dark because there were streetlights along the entire street. Rodriguez saw appellant walking behind A.M. They were far away, but he could still see them. They stopped walking and A.M. grabbed her leg. Appellant

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[4] *Miranda* v. *Arizona* (1966) 384 U.S. 436.

helped A.M. down and then took off running down the street. Appellant asked Rodriguez to call 9-1-1.

Appellant testified that he was homeless because he had recently spent his money on drugs and hotels. Appellant was concerned for the baby. Appellant began arguing with A.M. over money and drugs. Appellant and A.M. wanted to split up with each other but also needed a place to stay that night. A.M. initially agreed to stay at the abandoned house but changed her mind once appellant took her there sometime between 11:00 p.m. and 12:00 a.m.

Appellant explained they were walking to the area where the incident happened and were making up. A.M. told appellant they could stay at her sister's place and A.M. would take care of the drugs. A.M. started to walk faster. Appellant asked A.M. why she was happy and then upset. A.M. stared backward. Appellant looked back and saw two people coming from behind a car running toward him. The two people running up told appellant to leave A.M. alone.

When appellant turned back to look a second time, he saw one of the men throw something that he thought was a stick. A.M. called for appellant to come back. She was holding the back of her leg and was bleeding profusely. Appellant initially panicked because he was on drugs. He then wrapped A.M.'s leg to try to stop the bleeding. Appellant explained that four months before this incident he had been stabbed in the leg in the same neighborhood.

Instructions and Argument

The trial court instructed the jury with CALCRIM No. 220, the reasonable doubt instruction.[5] In its instructions to the jury concerning the elements of each offense, the

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[5] The jury was advised with the following version of CALCRIM 220:

"The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial.

trial court explained to prove appellant guilty of each the charged offense, the People had to prove each element. In an instruction concerning evidence of an uncharged act of domestic violence in 2007, the court advised the jury that the act could only be considered for appellant's propensity to commit violence and the people only had to show the prior incident was true by a preponderance of the evidence. The court further stated that: "The People must still prove each element of every charge beyond a reasonable doubt."

In his closing argument, the prosecutor explained the reasonable doubt instruction as follows:

> "Ladies and gentlemen, there was a jury instruction that was read to you by the judge, and you were told I need to prove all these charges beyond a reasonable doubt. Beyond a reasonable doubt. And if you find that there's two versions of the story and both versions are reasonable, then you can follow the version that points towards innocence, but that you must -- you must -- reject any versions that are unreasonable."

The prosecutor added that appellant's entire story was completely unreasonable. Regarding the question of reasonable doubt, defense counsel stated:

> "I only have to show reasonable doubt here. Now, it would be great if I could come up here and make the witness change the story or come in and show,

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"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.

"Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

"In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

you know, solid proof that my client was, you know, at another location and it's impossible that he did this. That's TV. That's not reality. This is reality.

"I have to show reasonable doubt. In your mind -- I have to put a question in your mind that it's possible that he's telling the truth, it's possible that his version of what happened and -- that it's reasonable, that you can't totally, completely disregard what he's saying. And if you can, if you can completely disregard what he's saying based on the evidence and all the evidence you've heard, then I haven't done my job."

Defense counsel explained that appellant testified and his testimony was consistent with what he told investigators. Defense counsel told the jury to pay attention to the written instructions on how to judge a witness's credibility and questioned A.M.'s reliability as a witness the evening of the event because she was under the influence of illegal drugs. Defense counsel argued there were inconsistencies in A.M.'s testimony. Defense counsel pointed out no independent witness observed any throwing motion by appellant. Also, no witness saw appellant in possession of a knife.

Defense counsel asked the jury to consider that if appellant stabbed A.M., why was it that he did not run away but stayed to help her? Defense counsel explained that even if the jury was not convinced appellant's story was true, the jury could "at least admit that it's possible and reasonable that that may have been what happened." The court sent the written jury instructions with the jury for its deliberations.

DISCUSSION

Appellant contends he was denied his right to effective assistance of counsel because during closing argument his attorney improperly stated that it was appellant's burden to show reasonable doubt. After reviewing the standard for establishing reasonable doubt, we conclude any deficiency by defense counsel was not prejudicial under the facts of this case.

The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decision making is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

The due process clauses of the United States and California Constitutions place on the prosecution the burden of proving beyond a reasonable doubt each element of a crime. The defendant has the right to have the jury determine each element of a crime beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470,481.) It is an impermissible statement of law for the prosecutor to suggest that the defendant has the burden of producing affirmative evidence to demonstrate a reasonable doubt of his innocence. (*People v. Hill* (1998) 17 Cal.4th 800, 831-332 (*Hill*).)

In *Hill*, the prosecutor argued that there had to be some evidence on which to base doubt. The Supreme Court concluded it was reasonably probable that this comment by the prosecutor was a misstatement of law constituting prosecutorial misconduct. (*Hill, supra*, 17 Cal.4th at pp. 831-832.) *Hill* involved multiple acts of error involving derisive comments by the prosecutor toward defense counsel, interruptions by the prosecutor of defense counsel, intimidation of witnesses by the prosecutor, misrepresenting the defendant's prior record, the shackling of the defendant, instructional error, and cumulative error. (*Id*. at 832-848.) The judgment in *Hill* was ultimately reversed. (*Id*. at p. 853.)

In contrast to the conduct of the prosecutor in *Hill*, the prosecutor in the instant case committed no acts of misconduct and accurately restated that it was the People who had the burden of proof beyond a reasonable doubt. The court used CALCRIM 220

which correctly sets forth the burden of proof. Before reciting the elements of each offense charged in the information as well as lesser included offenses, the trial stated that the prosecutor had to prove each element of the offense beyond a reasonable doubt. The jury was given a copy of the jury instructions to use during its deliberations. The jury asked no questions during deliberations.

Although it is clear that defense counsel twice misstated that he had "to show reasonable doubt," the appellant has to show it is reasonably probable that there would be a different outcome in this case in the absence of the error. The prosecutor set forth the correct burden of proof in his closing argument. The trial court, on multiple occasions, set forth the correct burden of proof both in CALCRIM 220 and the instructions concerning the elements of each offense and lesser included offense.

At the end of his closing argument, defense counsel noted that his client's testimony was "possible and reasonable." This was likely what defense counsel was inartfully trying to say at the beginning of his oral argument. The jury had the written instructions available to it during its instructions. The arguments of counsel generally carry less weight with a jury than do the instructions of the court. (*Waddington v. Sarausad* (2009) __ U.S. __, 129 S.Ct. 823, 834; *Boyle v. California* (1990) 494 U.S. 370, 384.) We cannot say that but for the error of appellant's counsel, the outcome of this case would be different. We find, therefore, that appellant has not shown prejudice.

DISPOSITION

The judgment is affirmed.